

Appl. No. 10/798,460  
Atty. Docket No. CM 2731  
Amdt. dated Oct. 6, 2006  
Reply to Office Action of July 7, 2006  
Customer No. 27752

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### REMARKS

#### **Claim Status**

Claims 1-12 are pending in the present application. No additional claims fee is believed to be due.

Claim 6 is cancelled without prejudice.

Claims 1 and 12 have been amended to recite a zwitterionic moisturising factor comprising a quaternary ammonium salt. Support for this amendment may be found on page 5, line 17 to page 6, line 9.

Claims 13 – 18 are new. Support for Claims 13 and 14 may be found on page 3, line 26 – page 4, line 2. Support for Claims 15 and 16 may be found on page 3 lines 1-3. Support for Claim 17 may be found in Claim 12 as originally filed and on page 3, line 26 – page 4, line 2. Support for Claim 18 may be found on page 3 lines 1-3.

These changes do not involve any introduction of new matter. Consequently, entry of these changes is believed to be in order and is respectfully requested.

#### **Rejection Under 35 USC §103(a)**

Claims 1-12 have been rejected under 35 USC §103(a) as being unpatentable over U.S. Patent Application Publication No. US2002/0041889A1 to Masuda et al (hereinafter "Masuda") in view of U.S. Patent No. 6,217,888 to Oblong et al. (hereinafter "Oblong").

In support of the rejection, the Office states:

It would have been obvious to one of ordinary skill in the art at the time the present invention was made to have modified the exemplified cosmetic compositions of Masuda et al. by incorporating to the compositions a vitamin B<sub>3</sub> compound as motivated by Oblong et al. because i) Masuda et al. teach adding vitamin B<sub>3</sub> compounds as a cosmetic additive; and ii) Oblong et al. teach that vitamin B<sub>3</sub> reduced the signs of skin aging and improves skin texture. The skilled artisan would have had a reasonable expectation of successfully producing a stable and improved cosmetic composition for moisturizing and treating aging skin because both Masuda et al. and Oblong et al. compositions are directed to compatible formulations such as emulsions, cream, and lotion.

In light of the amended claims, the Office's rejection is now believed to be moot. Specifically, the Office states that it would be obvious to modify "the exemplified

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cosmetic compositions of Masuda et al. by incorporating to the compositions a vitamin B<sub>3</sub> compound as motivated by Oblong.” However, Masuda provides no examples teaching all of the limitations of amended independent claims 1 and 12. Furthermore, Applicant wishes to address the Office’s use of Masuda.

Masuda is directed toward cosmetic or dermatological topical preparations containing an  $\alpha$ -amino acid derivative having a specified formula. *Abstract*. From paragraph [0033] to paragraph [0051], Masuda discloses optional ingredients that may be included in the  $\alpha$ -amino acid preparation. Masuda states, “Typical examples of such diluents, carriers and adjuvants include, but are not limited to, medicinal preparations, antibacterial agents, pH adjustors, antioxidants, etc., such as fats and fatty oils including wax, hydrocarbon oils, higher fatty acids, higher alcohols, silicones, surfactants, alcohols, water, viscosity adjustors, chelating agents, ultraviolet light absorbers, humectants and skin activators.” Paragraph [0033]. Thereafter, Masuda lists hundreds of suitable materials that fall within the general categories disclosed in paragraph [0033]. This “laundry list” disclosure of Masuda does not provide the particularized suggestion to yield Applicant’s claimed invention.

Applicant asserts that the present rejection is based an impermissible “obvious to try” standard. Case law describes a typical fact pattern where the impermissible “obvious to try” rationale is often used. “In some cases, what would have been ‘obvious to try’ would have been to vary all parameters or try each of numerous possible choices until one possibly arrived at a successful result, where the prior art gave either no indication of which parameters were critical or no direction as to which of many possible choices is likely to be successful.” *In re O’Farrell*, 853 F.2d 894, 903 (Fed. Cir. 1988). Masuda is similar to the situation described in *O’Farrell* in that Masuda lists hundreds of suitable materials but fails to provide direction as to what materials are critical.

It must also be noted that none of the examples provided in Masuda teach each and every limitation present in Applicant’s claims. Applicant can find no teaching on why one skilled in the art would pick any one or more specific optional ingredients from the list of hundreds to yield Applicant’s claimed invention.

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With regard to claim 8, the Office points to the disclosure within Oblong that a suitable emulsion may be a water-in-silicone emulsion. However, the Office has provided no motivation for modifying the exemplary formulations of Masuda, which do not appear to involve water-in-silicone emulsion. As a result, a *prima facie* case of obviousness has not been established.

With regard to claims 9 to 11, the Office points to Example 6 of Masuda for teaching the use of 0.2% of methylcellulose. However, Example 6 contains no glycerin, no vitamin B3 compound, and no zwitterionic moisturising factor comprising a quaternary ammonium salt. The Office has provided no motivation for modifying any of the other examples in Masuda to include a thickening agent and, specifically, a thickening agent comprising a carbomer, a polyacrylamide, polyacrylates, a sodium acrylate copolymer, a polyacrylamide, isoparaffin, a laureth-7 co-polymer, or mixtures thereof.


#### CONCLUSION

This response represents an earnest effort to place the application in proper form and to distinguish the invention as now claimed from the applied references. In light of the above remarks, it is requested that the Examiner reconsider and withdraw the rejection under § 103(a). Reconsideration of this application, entry of the amendments presented herein, and allowance of Claims 1-5 and 7-18 is respectfully requested.

Respectfully submitted,

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